BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 37530
	)	
BILL A. BALVANZ	)	**BOARD DECISION**
	)	(Precedential)
	)	
From dismissal from the position of Research Scientist I with the Department of Health Services at Sacramento	)	**NO. 96-16**
	)	
	)	November 5, 1996

Appearances: Dennis F. Moss, Esq., California Association of Professional Scientists, on behalf of appellant, Bill A. Balvanz; Michael B. Lumbard, Staff Attorney, Department of Health Services, on behalf of respondent, Department of Health Services

Before: Lorrie Ward, President; Floss Bos, Vice President; Ron Alvarado, Richard Carpenter and Alice Stoner, Members.

DECISION

This case is before the State Personnel Board (Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the matter of the appeal by Bill A. Balvanz (appellant) from a dismissal from the position of Research Scientist I with the Department of Health Services at Sacramento (DHS or Department).

Appellant was dismissed from his position based on charges that he ridiculed the Spanish language; demeaned a coworker regarding her lack of education; called his supervisor a liar; abruptly walked out of a committee meeting in protest; referred to another coworker as a "black bitch;" and threatened to kill his supervisor. The ALJ found cause to discipline appellant on grounds of insubordination and discourtesy but reduced the penalty to a nine months' suspension based on appellant's 14 years of service,

his recognition that he used poor judgment and his psychiatrist's opinion that he would exercise better control in the future. The ALJ also found that, although appellant threatened to kill his supervisor, appellant had no intent to carry out the threat. The Board rejected the ALJ's Proposed Decision and determined to decide the case itself. After a review of the record in this case, including the transcript, exhibits, and the written and oral arguments of the parties, the Board sustains appellant's dismissal.

SUMMARY OF THE FACTS

Appellant began working for DHS as a Research Analyst I on November 30, 1980. He received regular promotions over the years and has served as a Research Scientist I since 1993. Until his dismissal, appellant worked in the Epidemiology Section of the DHS Maternal and Child Health (MCH) Branch where he performed epidemiologic studies and surveys; developed population-based surveillance systems under Title V and legislative mandates for public health, medical, social and psycho-social subject matters related to MCH; and participated in the annual community-based statewide needs assessment.

Appellant has no prior adverse actions, but was verbally counselled by his supervisor on March 30, 1994 for "storming" out of a section staff meeting.

Appellant was supervised by Dr. Gilberto Chavez, the Section Chief. Dr. Edward Graham, a Research Scientist II, intermittently served as Section Chief in Chavez' absence. Graham and appellant were personal friends.

Threatening Conduct

During the week ending April 21, 1995, appellant exchanged electronic mail messages (e-mail) with Chavez concerning appellant's timekeeping. Chavez' note to appellant indicated that Chavez considered appellant to be absent without leave (AWOL) during parts of April 20 and 21. Appellant sent an e-mail back that his daughter had been sick, that on both days he had called at approximately 8:00 a.m. to inform the office of his absence and that he had told the office that he planned to be at work about "1:00 or so." Appellant explained in his note that he had actually arrived at the office approximately 1:30 p.m. both days, but that on April 21 he had car trouble and had again gone out to wait for the tow truck. Appellant noted that he returned between 2:15 p.m. and 2:30 p.m. Appellant stated that he would fill out the appropriate absence forms for both family sick leave and vacation time.

On Monday April 24, 1995, Graham was acting as Section Chief while Chavez traveled to Seattle and then Alaska on Department business. Early that morning, appellant came to Graham to complain about Chavez' treatment of him. Graham told appellant that the AWOL allegation was most likely a misunderstanding that appellant could clear up by turning in a time slip. Appellant left.

Although Chavez was not in the office that morning, he had replied by e-mail to appellant's last note challenging appellant's

version of the facts and noting that appellant had not completed leave slips by the end of the day as required. Chavez also told appellant:

> This is not the first time that this happens [sic]. I have become increasingly concerned about your attendance. You are frequently late, gone before 5:30, take longer than 30 minute lunches, or fail to turn in leave slips. Lastly, you are frequently away from your desk when you have no official MCH reason to be gone.[1]

After reading the note, appellant returned to Graham's office. He stood in the doorway and said, "I am going to kill Gilberto." Graham, who was sitting at his computer terminal, turned to appellant and said, "Don't say that. Never say things like that." To which appellant responded, "I am going to kill Gilberto." Graham repeated his admonition that appellant not say things like that. Appellant turned abruptly and left.

Graham described appellant in general as very volatile and quick to anger. Graham testified that when appellant got angry his "body language changed" and he adopted "an aggressive type of posture." Graham tried to stay away from appellant when appellant was angry.

Graham testified that, during the April 24, 1995 threat discussion, appellant was very upset and angry. Appellant's face was contorted. Graham testified, "I personally felt at the time

[1] *It is not clear from the record whether appellant received Chavez' response before or after his first visit to Graham's office. We assume that appellant received the response after his first visit to Graham. Either way, our analysis remains the same.*

that, if he had had a twelve gauge shotgun, he would've gone in and shot my boss."

A few months earlier, Graham had participated in a similar discussion with appellant. During that discussion, appellant complained about Chavez and stated that he was going to get a "30 aut 6 and shoot him." At that time, Graham told appellant not to say these kind of things because he could get fired. Appellant told Graham that he was joking and did not mean it.

Graham testified that he did not report this earlier incident. Graham believed at that time that Balvanz was just venting his anger. But after the second threat, Graham changed this opinion and felt that appellant should be evaluated.

That same day, Graham reported appellant's statements to Donald Mitchell, the Assistant Chief. Mitchell called appellant into his office to discuss the incident. During the discussion, appellant told Mitchell that he had no intention of harming Chavez.

Appellant testified that Chavez' most recent e-mail was "the straw that broke the camel's back." Appellant admitted that he said, "My God, I am so mad, I could kill Gilberto" and that Graham responded, "Don't say things like that." Appellant testified that he was venting and needed to say the words. Appellant believed he could make such statements to Graham, whom appellant considered to be his friend and confidant. He and Graham socialized, took coffee breaks together, and discussed workplace problems. Appellant

thought Graham would know that he was only venting his frustration and had no intention of carrying out the threat.

Effect of Threat

Mitchell informed the Epidemiology section staff that appellant had threatened Chavez' life and that appellant had been placed on administrative leave and would not be allowed to return to work. For reasons not clear from the record, Mitchell did not inform the section members that appellant had also later stated that he had no intention of harming Chavez.

On April 27, 1995, Mitchell notified Chavez in Alaska that appellant had been placed on administrative leave for making a threat against Chavez' life but did not communicate appellant's statement that he did not intend to harm Chavez.

On Friday, April 28, 1995, Chavez returned from Alaska. He took Monday and Tuesday off to assure himself of his family's personal safety. Chavez sought a temporary restraining order against appellant. He spoke with his wife about what precautions to take to ensure the family's safety. He and his wife determined to be less predictable in travel routes between work, school and home. They notified their day care provider. Chavez locked his office door while at work.

Although appellant did not personally threaten Graham, Graham was very concerned that appellant would retaliate against him for making the report. Graham installed motion detectors at his home,

kept a loaded gun ready and slept on a couch downstairs in his home. Graham also reported appellant's description to his local police, his neighbors and his daughter's day school.

As for the rest of MCH Branch employees, many were apprehensive and fearful. The record is replete with examples. At least one employee was afraid to open larger pieces of mail. Another testified that, after discussing the situation with her son, a policeman, her plan was to "fly under the desk" when the "shooting started." Graham described appellant's statements as "creating chaos" in the workplace.

Appellant's Defense to Threat Charge

After appellant was dismissed from his position, he began seeing Dr. Philip N. Clar, a clinical psychologist at Kaiser Permanente. Appellant was referred to Dr. Clar by Dr. Robert Stern, a psychiatrist who has treated appellant since 1990.

Dr. Clar interviewed appellant on three occasions. Dr. Clar diagnosed appellant as having an obsessive/compulsive personality. Dr. Clar testified that such individuals were not prone to violence, but did have imperfect control over angry thoughts. Dr. Clar was of the opinion that appellant would not carry out a violent act. Dr. Clar gave a number of reasons for this opinion including the fact that appellant regretted his hostile comments as poor judgment and that appellant did not fit the profile of individuals who acted on angry thoughts. Among other factors,

Dr. Clar noted that appellant was more than 45 years old; resided in an intact family with children; did not abuse substances; was not psychotic; did not own a gun; did not have a history of violence and/or a criminal record; had sought and was given treatment for obsessive/compulsive character traits; and understood the consequences of his actions. Dr. Clar stated that appellant must take medication for his chemical imbalance to reduce his obsessive tendencies, but believed appellant was capable of exercising control over his behavior in the future.

Inappropriate Remarks

Appellant was also charged with making inappropriate remarks about two co-workers, an African American woman and a newly appointed Research Analyst, and with making statements that ridiculed the Spanish language.

(Incident Regarding Cheryl Scott)

In March of 1995, Dr. Cheryl Scott was the principal investigator on a project. Scott is African-American.

On March 16, 1995, Graham approached appellant to ask why he had not completed a work assignment Scott needed before she left on maternity leave. During the discussion, Balvanz referred to Scott as a "black bitch." Graham directed appellant not to repeat his statement, or refer to his colleagues in that manner. Appellant complained that Scott had "wronged" him and lied to him. Graham

told appellant that he did not "want to hear it," and directed him to complete the assignment.

(Spanish Wordplay)

On one occasion prior to September 15, 1994, when Chavez was in the office with his young daughter, appellant used the phrase, "hasta banana" as he walked out the door. Appellant did not know Chavez' daughter was present.

Graham told appellant not to engage in wordplay with the Spanish language because people could be offended by his statements. Graham was not appellant's supervisor at the time. Chavez later told appellant the same thing, i.e., not to make fun of the Spanish language.

On a later occasion, appellant allegedly made a joke by wordplay with the Spanish language. The Department did not present evidence of the words appellant said. The Department demonstrated, however, that after appellant spoke the words he immediately put his hand over his mouth stating, "Oops, I guess I am not supposed to say that." Appellant admitted the wordplay. Appellant contends, however, that his "Oops" statement was not made sarcastically, but rather to "check" himself.

(Incident with Anna Lopez)

On September 15, 1994, two of appellant's colleagues asked him to prepare charts for a project they were working on. Appellant told them he would help with their project if his supervisor,

Chavez, agreed. Chavez approved the project. According to appellant, Chavez also informed appellant that he could enlist the assistance of Anna Lopez, a former Office Technician who had recently been appointed to a Research Analyst position.

At about 4:55 p.m. that day, appellant approached Lopez, handed her a book, asked her to calculate ratios on one of the pages, and return the ratios in five minutes. Lopez and her sister, Office Assistant Cynthia Buitron, thought appellant was joking because his request was at the end of the working day. Appellant told Lopez that, "It is very simple, something a high school graduate can do." Chavez overheard part of the conversation and asked Lopez what appellant had asked her to do.

Chavez then entered appellant's office with the book, and asked him why he had given Lopez work without his authorization. Appellant responded that Chavez had given him permission to use Lopez. Chavez denied he had authorized appellant to use Lopez' services. Appellant responded that Chavez lied to him. Chavez asked appellant if he was calling him a liar. Appellant requested the book from Chavez. When Chavez returned it, appellant tossed it into his in-basket on his desk.

The tone of the interaction between Chavez and appellant is unclear. A number of employees claimed to have overheard the interaction. Chavez, Lopez, and two other employees, Cynthia Buitron and Gloria Sopranuk testified that appellant yelled, and

Chavez was calm. Appellant and two other employees, Maria Jungkeit, and Kathleen Whitaker, testified that Chavez yelled, and appellant was calm. Jungkeit and Whitaker are not supervised by Chavez. They also testified that Sopranuk was not present as she generally left work at 3:30 p.m. to 3:45 p.m. It is undisputed, however, that appellant accused Chavez of lying to him.

According to Lopez, appellant later saw Lopez approach the section's copy machine, and asked to speak with her in his office. Lopez agreed. Appellant informed Lopez that he had just argued with Chavez, but it had nothing to do with her. Appellant told Lopez that he disagreed with DHS' promotion of individuals into the analytic field without a college degree, but hoped his statement did not offend her. Lopez did not have a college degree and was insulted. She told appellant that she had worked hard for the position, and he was not going to make her feel inferior. She later informed Chavez that she did not want to work with appellant.

Appellant contended that his comment that any high school graduate could do the assignment was an attempt to reassure Lopez of her competence. He congratulated Lopez on her promotion, but stated that, if he was the manager, he would have paid her way through college and then promoted her. Appellant explained to Lopez that he obtained a masters degree and five years experience before he was hired as a researcher. Appellant told Lopez that researchers cannot be held accountable for what they do not know.

According to Jungkeit, who took the bus home with Lopez, Lopez asserted that appellant was going to "pay" for saying that she should not have been hired.

The ALJ, who heard the testimony of the witnesses and was able to assess their credibility, rejected appellant's claim that his remarks were intended to reassure Lopez. We agree. Appellant's remarks were condescending and calculated to insult Lopez.

December 7, 1994 Meeting

On December 7, 1994, appellant attended the weekly Title V Strategic Planning Committee meeting. Present at the meeting were Drs. Chavez, Melia and Shah, Gloria Sopranuk and appellant. One of the ground rules for the meeting was that a committee member could comment without fear of retaliation.

During the meeting, Melia presented an issue that he wanted to discuss. Appellant wanted to discuss another issue. Melia asked appellant to defer his issue, and focus on the issue being addressed. Appellant gathered his papers and left the meeting abruptly.

After the meeting, Dr. Shah, the Chief of the MCH branch, issued appellant a memo, expressing concern for his behavior at the meeting and advising appellant to contact the Employee Assistance Program (EAP) to obtain help in controlling his anger.

Appellant testified that leaving the meeting was a statement of protest regarding the committee's lack of progress, and that his

departure from the meeting after Melia's statement was a coincidence. He denied "storming" out of the room.

Allegations

At the hearing, appellant moved to dismiss a number of allegations in the Notice of Adverse Action on the grounds that the Notice did not provide sufficient specificity upon which appellant could prepare a defense. Leah Korman (1991) SPB Case No. 91-04. The ALJ partially granted the motion, dismissing seven charges without prejudice. The Department chose not to amend the Notice to cure the pleading deficiencies. At the conclusion of the second day of hearing, the Department withdrew some additional allegations.

The remaining charges include: ridiculing the Spanish language; demeaning a co-worker regarding her lack of education; calling his supervisor a liar; abruptly walking out of a committee meeting in protest; referring to another co-worker as a "black bitch;" and threatening to kill his supervisor. This conduct is alleged to violate Government Code sections 19572 (e) insubordination, (h) intemperance, (m) discourteous treatment of other employees, and (w) unlawful discrimination and harassment on the basis of sex, race and ethnic origin.

ISSUES

The following issues are before the Board for consideration:

1. Did the Department prove the charges by a preponderance of the evidence?

2. What is the appropriate penalty?

DISCUSSION

Discourtesy

Government Code 19572, subdivision (m) allows an employee to be disciplined for discourteous treatment of a fellow employee or the public. Appellant's threatening comments constitute discourteous treatment of his supervisor as well as his acting supervisor, Graham. Likewise, appellant's "black bitch" comment regarding Dr. Cheryl Scott and condescending comments to Anna Lopez constitute discourtesy.

Appellant was also discourteous when he accused his supervisor of lying about authorizing appellant to use Lopez' services. Appellant admits he accused Chavez of lying. Whether or not authorization was given by Chavez is irrelevant to our determination that appellant was discourteous to Chavez when he accused him of lying. Accusations of lying tend to escalate a polite but tense disagreement into an emotional argument. Thus, we find that appellant was discourteous when he accused his supervisor of lying.

Appellant's abrupt exit from the December 7 meeting also constitutes discourtesy. At the hearing before the Board, appellant, through his attorney, argued that appellant's abrupt exit from the meeting indicated appellant's commitment to managing his anger. While leaving a meeting is better than acting out inappropriately during the meeting, leaving abruptly, without explanation, is, nevertheless, discourteous to those in attendance.

Finally, we find that appellant's continued practice of Spanish wordplay was also discourteous. Both appellant's friend, Graham, and his supervisor, Chavez, made it clear that such wordplay was unwelcome; yet appellant continued. Appellant admitted Spanish wordplay after being asked to refrain from engaging in such conduct. Continuing offensive conduct after being asked to desist constitutes discourtesy.

Insubordination

In Richard Stanton (1995) SPB Dec. No. 95-02, p. 10, the Board held:

> "[T]o support a charge of insubordination, an employer must show mutinous, disrespectful or contumacious conduct by an employee, under circumstances where the employee has intentionally and willfully refused to obey an order a supervisor is entitled to give and entitled to have obeyed. (citations omitted). A single act may be sufficient to constitute insubordination if it meets the above test.
> ...Appellant has no right to put conditions on his obedience. Appellant's initial refusal to obey his supervisor's order constitutes insubordination."

On April 24, 1995, after appellant told Graham that he was going to kill Chavez, Graham, who was Acting Section Chief at the time, directed appellant not to make such statements. Appellant immediately repeated the statement. Appellant knew or should have known that Graham was Acting Section Chief. Appellant was well aware that Chavez was out of the office and that, in Chavez' absence, Graham would be Acting Section Chief. Repeating a statement, after being ordered not to repeat the statement, constitutes insubordination.

Appellant was also ordered to stop the practice of wordplay on the Spanish language. Graham told appellant to stop but was not acting as his supervisor at the time. There was evidence, however, that Chavez also told appellant to stop. Appellant admits that he failed to stop the word play after being asked to do so. Thus, appellant was insubordinate in continuing to practice wordplay on the Spanish language.[2]

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[2] *The Department also charged appellant with intemperance and unlawful discrimination. Intemperance under Government Code section 19572, subdivision (h) is limited to misconduct related to the use of liquor. Gary Sharp and Frankie J. Johnson (1995) SPB Dec. No. 95-14 at pg. 4. There was no showing that appellant's conduct was related to the use of liquor.*

Although the Department proved that appellant referred to a co-worker as a "black bitch" and made inappropriate wordplay on the Spanish language, these isolated references are not sufficiently egregious to constitute unlawful discrimination.

Penalty

When performing its constitutional responsibility to review disciplinary actions [Cal. Const. Art. VII, section 3(a)] the Board is charged with rendering a decision which is "just and proper". (Government Code § 19582). To render a decision that is "just and proper," the Board considers a number of factors it deems relevant in assessing the propriety of the imposed discipline. Among the factors the Board considers are those specifically identified by the Court in Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194 as follows:

> ...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in [h]arm to the public service. (Citations.) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. (Id. at 217- 218.)

The Department proved various charges against appellant that warrant adverse action. Appellant has demonstrated inappropriate speech on a number of occasions. He accused his supervisor of lying, referred to a peer as "black bitch," made condescending comments to a co-worker, repeated a threatening statement after being ordered not to, and, despite being informed that his joking about the spanish language was unwelcome, continued the practice of Spanish wordplay. Appellant also demonstrated his lack of control and disrespect for his co-workers by abruptly exiting a routine meeting because it was not going according to his plan.

While the other sustained charges against appellant warrant some appropriate discipline, we suspect that the penalty of dismissal was based primarily on appellant's threatening statement: "I am going to kill Gilberto." In a recent decision, Carla Bazemore (1996) SPB Dec. 96-02, the Board upheld the Department's decision to discipline an employee based on threats alone. In that case, Bazemore told a co-worker "if I lose my job, everyone is going down with me." When asked the meaning of her statement, Bazemore replied, "You remember what happened at the post office?" Bazemore's co-workers did not believe that her post office comment was a joke. The Board found:

> [S]erious harm inures to the public service when an employee makes credible threats of violence against another employee. . . Whether or not appellant intended to worry her fellow employees or follow through on her actions is not necessarily determinative: rather, it is enough that the threats made by appellant were such as to cause the reasonable person to worry about their personal safety. Id. at 14.

In contrast, in Frank G. Bennett (1994) SPB Dec. No. 94-01, when an employee threatened to "cut [his co-worker's] balls off and shove them down his throat," the Board determined that dismissal was not appropriate. The Board found that, given the nature of the "threat" and the circumstances under which it was uttered, no reasonable person would conclude Bennett was actually threatening physical harm. Furthermore, the record evidence in Bennett did not

reflect that Bennett's co-workers feared Bennett or considered him to have a violent nature.

The present case closely tracks the facts of Bazemore. Here, appellant made a credible threat of violence. Graham, the Acting Section Chief, heard appellant's threatening statements and took the statements seriously. Graham stated at the hearing that, "I personally felt at the time that if he had had a twelve gauge shotgun, he would've gone in and shot my boss."

Graham was so convinced that appellant's threats were real that he became concerned that appellant would turn on him for reporting the threats. Graham took steps to protect his family including notifying the police, the neighbors and his daughter's day care center.

Chavez, the target of appellant's threats, also took the threats seriously. Chavez sought a temporary restraining order and worked out a plan for his family's safety which included varying the routes used to go to work, day care and home. Appellant's co-workers were, likewise, concerned for their safety.

Appellant was described as volatile and quick to anger. Appellant's own expert witness acknowledged that appellant had imperfect control over his angry thoughts. There was no showing that Graham, Chavez or the other employees were unreasonable or overly sensitive in their responses.

In his defense, appellant claims he had no intention of carrying out his threat. Appellant claims to have been merely venting to a friend and confidant. Even if appellant was venting when he made the threatening statements, he took the risk that Graham would take his threat seriously and communicate it to others. In addition, even though Mitchell did not pass on to Chavez or the others appellant's assertion that he had no intent to carry out his threat, there was no showing that such an assertion would have made any difference in the responses of appellant's co-workers.

In support of his request for mitigation of the penalty of dismissal, appellant presented the testimony of Dr. Clar. After interviewing appellant, Dr. Clar found that, although appellant had imperfect control over his angry thoughts, appellant did not fit the profile for individuals who act on their angry thoughts. In addition, Dr. Clar noted that appellant regretted his hostile comments as poor judgment.

The Board rejects Dr. Clar's testimony as adequate support for appellant's claim that mitigation of penalty is appropriate. Appellant's after-the-fact reassurances do not make up for the harm to appellant's unit. The workplace should not be held emotional hostage to the inability of a state employee to control expression of his angry thoughts. Appellant created an atmosphere of fear in

the workplace and must bear the consequences of his actions. Dismissal is appropriate.

CONCLUSION

For all of the above reasons, we find that the dismissal taken by the Department of Health Services is appropriate and should be sustained.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to Government Code section 19582, it is hereby ORDERED that:

1. The dismissal of Bill A. Balvanz from the position of Research Scientist I with the Department of Health Services is sustained.

2. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

THE STATE PERSONNEL BOARD

Lorrie Ward, President

Floss Bos, Vice President
Ron Alvarado, Member
Richard Carpenter, Member
Alice Stoner, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on November 5, 1996.

C. Lance Barnett, Ph.D.
Executive Officer
State Personnel Board